No. 18-18

In The Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF THE PETITIONER, MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES

Abington Sch. Dist. v. Schempp,
374 U.S. 203 (1963) 6

Am. Atheists, Inc. v. *Duncan*,
637 F.3d 1095 (10th Cir. 2010) 4

American Atheists, Inc. v.
Port Authority of New York and New Jersey,
760 F.3d 227 (2d Cir. 2014) 4

Briggs v. *Mississippi*,
331 F.3d 499 (5th Cir. 2003) 4

Buono v. *Kempthorne*,
527 F.3d 758 (9th Cir. 2007), *amended*,
527 F.3d 758 (9th Cir. 2008), *rev'd & remanded by Salazar v. Buomo*,
559 U.S. 700 (2010) 3-4

Buono v. *Norton*,
371 F.3d 543 (9th Cir. 2004) 3

County of Allegheny v. ACLU,
492 U.S. 573 (1989) 6

Engel v. Vitale,
370 U.S. 421 (1962) 6

Epperson v. Arkansas,
393 U.S. 97 (1968) 5, 6

Everson v. Bd. of Educ.,
330 U.S. 1 (1947) 5

Lee v. *Weisman*,
505 U.S. 577 (1992) 2

Lynch v. *Donnelly*,
465 U.S. 668 (1984) 2, 6

Murray v. *City of Austin*,
947 F.2d 147 (5th Cir. 1991) 4

Salazar v. *Bouno*,
559 U.S. 700 (2010) 2, 4

Sch. Dist. of Grand Rapids v. Ball,
473 U.S. 373 (1985) 5

Separation of Church & State Committee v.
City of Eugene,
93 F.3d 617 (9th Cir. 1996) 3

Trunk v. *City of San Diego*,
629 F.3d 1099 (9th Cir. 2011) 4

Van Orden v. *Perry*,
545 U.S. 677 (2005) 4, 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND I ..... *passim*

INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

The Institute is particularly interested in this case because the decision of the Fourth Circuit threatens citizens' First Amendment rights to freely exercise their religion. Religious freedom was the main aspiration that sent America's founders searching for independence from England. That is why the Framers included the guarantee of freedom of religion in the First Amendment. If allowed to stand, the Fourth Circuit's decision will interfere with religious freedom in a way that would have been unfathomable even by the standards of eighteenth century England—much less those of the twenty-first century United States of America.

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[1] Counsel of record for all parties received notice at least ten days before the due date of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief in communications on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision widens the split among the Circuits as to whether the Establishment Clause requires the eradication of all religious symbols in the public realm. This Court has consistently held that it does not, but the Ninth Circuit was the first to disagree. It was later joined by the Tenth Circuit and, now, the Fourth Circuit. In the interim, the Second and Fifth Circuits have dutily followed this Court's First Amendment jurisprudence. This split is particularly dangerous because it threatens one of the fundamental freedoms guaranteed by the First Amendment, freedom of religion. The Institute therefore respectfully requests that the petition be granted and the decision of the Fourth Circuit reversed.

ARGUMENT

The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..." As envisioned by the Framers, the Establishment Clause was intended to guarantee freedom ***of*** religion. As reinterpreted by the Fourth Circuit, however, the Establishment Clause instead guarantees freedom ***from*** religion.

This Court's precedents are clear that the Establishment Clause "does not require eradication of all religious symbols in the public realm." *Salazar* v. *Bouno*, 559 U.S. 700, 718 (2010) (plurality opinion) (citing *Lee* v. *Weisman*, 505 U.S. 577, 598 (1992)). *See also Lynch* v. *Donnelly*, 465 U.S. 668, 678-679 (1984).

According to the Fourth Circuit, however, the memorial to World War I veterans of Prince George's County that has stood in a public park for the past 93 years ago—known as the Peace Cross—simply has to go.

Why? Like the hundreds if not thousands of grave markers that dot Arlington National Cemetery, the monument at issue is in the shape of the Latin Cross. This is unacceptable, according to the panel of the Fourth Circuit that issued the decision, because the Latin Cross is "the preeminent symbol of Christianity." App. 20a. On that basis, the panel majority concluded that the Establishment Clause requires that the Peace Cross must be "raz[ed]," have its arms "remov[ed]," or be subject to "alternative arrangements that would not offend the Constitution." App. 31a-32a n.19. Like the ancient statues of Buddha in Afghanistan that the Taliban had dynamited in 2001, the Peace Cross must come down.

In fairness to the Fourth Circuit panel majority, its decision was not without precedent. It was a logical extension of prior holdings of other Circuit Courts of Appeal, beginning with the Ninth Circuit. In a series of decisions dating back more than 20 years, the Ninth Circuit has found that the Establishment Clause prohibits war memorials in the shape of a cross. This trend began with *Separation of Church & State Committee* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam). It continued with *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004) and *Buono* v. *Kempthorne*, 527 F.3d 758 (9th Cir. 2007), *amended*, 527 F.3d 758 (9th Cir. 2008), *rev'd by &*

remanded by Salazar v. Buono, 559 U.S. 700 (2010). And it was reaffirmed in *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1110-12 (9th Cir. 2011). The Tenth Circuit has also found a "presumption of unconstitutionality" for commemorative crosses. *Am. Atheists, Inc.* v. *Duncan*, 637 F.3d 1095, 1102-03 (10th Cir. 2010) (Kelly, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc).

By following these courts' precedents, the Fourth Circuit panel majority widened the split among the Circuits. Its decision stands in sharp contrast to decisions of the Second and Fifth Circuits upholding public displays of crosses in contexts analogous to those present here. In *American Atheists, Inc.* v. *Port Authority of New York and New Jersey*, 760 F.3d 227 (2d Cir. 2014), the Second Circuit upheld the display of a cross-shaped memorial at the September 11 Museum. Similarly, in *Murray* v. *City of Austin*, 947 F.2d 147, 149 (5th Cir. 1991), the court upheld the display of a Latin cross in the town seal of Austin, Texas. *See also Briggs* v. *Mississippi*, 331 F.3d 499 (5th Cir. 2003) (upholding the use of the St. Andrew's Cross in the Mississippi state flag).

This split in the Circuits should be corrected before any more damage is done to the Peace Cross, not to mention the First Amendment. Resolving this split is particularly important because the Fourth Circuit's decision is contrary to this Court's First Amendment jurisprudence. As set forth in Petitioner's Brief, the precedents of this Court that the Fourth Circuit has joined with the Ninth and Tenth Circuits to effectively overrule precedents such as *Salazar* and *Van Orden* v. *Perry*, 545 U.S. 677

(2005). Requiring the destruction or dismemberment of the Peace Cross will engender the very sort of "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

This Court has consistently held that the Establishment Clause's guiding principle is government neutrality toward religion in the sense that a state cannot favor religion over non-religion or one religion over another. This neutrality principle has been set forth by this Court on multiple occasions. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *see also Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (noting that this Court has "consistently recognized" a requirement that "the government . . . maintain a course of neutrality among religions, and between religion and nonreligion"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("Th[e] [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.").

It is as much a violation of the Establishment Clause for the government to favor non-religion as it is for the government to favor religion. That is why the Court has noted that "'[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward

any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 672 (1983) (citations omitted).

The Court has long recognized the role that religion has played in our nation's history. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963) ("[R]eligion has been closely identified with our history and government . . . ."); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."). The Court has also stated that "[a] secular state . . . is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed." *Allegheny*, 492 U.S. at 610. The wiping out of all public references to religion is entirely inconsistent with the Establishment Clause's mandate that government exhibit "neutrality between . . . religion and nonreligion." *Epperson*, 393 U.S. at 103-04. And such whitewashing of our country's religious history will take us dangerously close to an effective endorsement of atheism as our nation's official creed.

CONCLUSION

The Framers never envisioned that the Establishment Clause would require the obliteration of all religious symbols from every public place, especially not in the secular context in which the Peace Cross is displayed in Prince George's County, Maryland. The Fourth Circuit decision is not faithful to the text of the First Amendment or its subsequent interpretation by this Court. The Institute therefore

respectfully requests that the petition be granted and that the decision of the Fourth Circuit be reversed.

Respectfully submitted,

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